

F.A. O. No.1786 of 2005.

1

In the High Court of Punjab and Haryana at Chandigarh.

F.A.O.No.1786 of 2005.

Date of decision:1.9.2006.

S.K. Jain

...Appellant.

Versus

M/s Vardhman Properties & Investment Ltd. And others.

...Respondents.

...

Coram: Hon'ble Mr. Justice S. N. Aggarwal.

...

Present: Mr.Arun Jain and Mr. Ramesh Kumar, Advocates for the appellant.

Mr. R.C.Setia, Senior Advocate with Mr.Anish Setia, Advocate.

...

Judgment.

S. N. Aggarwal, J.

This order will dispose of other two appeals also registered at FAO No.1849 of 2005 and FAO No.1787 of 2005 as common questions of law and facts are involved. For the sake of convenience, the facts are taken from FAO No.1786 of 2005.

M/s Compaux Enterprises (respondent N.2) had taken three different loans from M/s Vardhman Properties and Investment Limited, Chandigarh (respondent No.1) for purchase of plant and machinery etc.

S.K.Jain, appellant and Rachna Ram, respondent No.3 (now deceased) were the guarantors. There was a dispute between the parties. As per arbitration clause in the agreement, the matter was referred to the Arbitrator (Shri Lalit Mohan Suri, Advocate, Punjab & Haryana High Court, Chandigarh) who vide his three separate awards dated 25.10.1997 awarded the following amounts:-

Principal amount.	Interest @ 24% from 13.3.1996 to 13.2.1997.
1.Rs.17,24,426/-	Rs.3,83,248/-
2.Rs.22,97,572/-	Rs.5,10,627/-
3.Rs.1,79,493/-	Rs.39,892/-

These amounts were found payable as on 24.2.1997 and further interest at the rate of 24% per annum was also awarded.

The said awards were challenged by N.K.Jain, proprietor of M/s Compaux Enterprises and by S.K.Jain (present appellant) by filing three separate objection petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be called Act of 1996) on 28.1.1998. The same were dismissed by the Court of Additional District Judge, Chandigarh on 14.9.2001 (Annexure P-2). Further appeals filed in the Hon'ble High Court (FAO No.4270 of 2001, FAO No.166 of 2002 and FAO No.167 of 2002) were disposed of by this Court vide order dated 18.2.2003 by which interest was reduced from 24% per annum to 7.5% per annum.

It was submitted at the time of arguments that Petitions for

Special Leave to Appeal were also dismissed by the Hon'ble Supreme Court and, therefore, the awards dated 25.10.1997 had become final.

During the pendency of the objection petitions, respondent No.1 filed applications for permission to file execution applications with regard to the amounts which were not disputed by the appellant. The version of respondent No.1 was that in the objection petitions the dispute was only with regard to the rate of interest which was claimed by respondent No.1 at the rate of 24% per annum. After hearing both the parties, the stay order against the execution of the awards was withdrawn and respondent No.1 was permitted on 12.2.2000 to file execution applications with regard to admitted amounts.

Accordingly, on 14.2.2000 respondent No.1 filed execution applications of the awards dated 25.10.1997 by claiming interest at the admitted rate of interest @ 7.5%. The executions applications proceeded at the snail speed. The judgment debtors including the appellant filed various applications to stall the execution proceedings. In other words, the execution applications for the enforcement of the awards dated 25.10.1997 to the extent of undisputed amounts remained at initial stage till 14.9.2001 when the objection petitions filed by the judgment debtors under Section 34 of the Act of 1996 were dismissed by the Court of Additional District Judge, Chandigarh. It was only on 2.2.2002 that an application under Order 21 Rule 66 read with Section 151 CPC was filed by respondent No.1 in which the appellant and

respondent Nos. 2 and 3 were served on 4.5.2002. House No.279-P, NAC, Shivalik Enclave, Mani Majra, UT Chandigarh owned by the appellant was the mortgaged property against these loans. It was ordered to be sold through Munadi which was to be effected on 16.7.2002. The auction was fixed for 5.8.2002. Shri S.P.Goyal, Advocate was the Court Auctioneer. He reported that no bidder was available.

Accordingly, respondent No.1 (decree holder) filed an application for permission to purchase the property in auction proceedings. Rs.50 lacs were fixed to be the reserve price. Auction took place on 27.5.2003 i.e. even after the appeal filed by the judgment debtors against the order dated 14.9.2001 was dismissed on 18.2.2003. The decree holder i.e. respondent No.1 purchased the mortgaged property for an amount of Rs.50,60,000/-. A sum of Rs.46,94,357/- which was the decretal amount was adjusted against the sale proceeds. 25% of the remaining amount was deposited by respondent No.1 on 27.5.2003 itself. The remaining i.e. Rs.2,74,233/- being 3/4th of the balance sale price was deposited subsequently. The remaining amount of Rs.3,65,643/- was adjusted as under:-

Rs.98,511/- were payable by the judgment debtors to one Surinder Kumar as per award of the Labour Court. Interest at the rate of 9% came to be Rs.70,489/-.Accordingly, a sum of Rs.1,69,000/- was paid to Surinder Kumar for adjustment of the award passed by the

Labour Court in favour of Surinder Kumar and against the appellant. Rs.1,26,625/- (Rs.91,410.75P plus Rs.35,214.25P) were paid to the Court Auctioneer who was also to deposit some amount in the Treasury as share of the Government. The remaining amount of Rs.70,018/- was ordered to be paid to the decree holder (respondent No.1) against the further amount outstanding against the judgment debtors on account of interest accrued after the filing of the execution applications.

The appellant filed an application under Order 21 Rule 90 CPC with a prayer to set aside the sale of House No.279-P,NAC, Shivalik Enclave, Mani Majra,UT Chandigarh through auction held on 27.5.2003 on various grounds but the said application was dismissed by the learned Additional District Judge, Chandigarh vide order dated 7.1.2005. The sale of House No.279-P, NAC,Shivalik Enclave, Mani Majra, UT Chandigarh was confirmed in favour of the decree holder and a direction was given for the issuance of a sale certificate in favour of the auction purchaser.

Hence, the present appeal.

The first submission made by the learned counsel for the appellant was that the arbitration award required registration as in the arbitration award the Arbitrator had observed that house No.279-P, NAC, Shivalik Enclave, Mani Majra, UT Chandigarh was under mortgage with the award holders, therefore, they would be entitled to

sell the said property mortgaged with them to recover the amount. The arbitration award has admittedly not been registered. Therefore, it is not a valid document in the eyes of law. Reliance was placed on the judgment of the Hon'ble Supreme Court reported as **Lachhman Dass v. Ram Lal and another**, AIR 1989 SC 1923.

This submission has been considered. Admittedly reference made to the Arbitrator was to decide the dispute between the parties regarding the outstanding amount against the principal debtor and the guarantors including the appellant. That amount was determined by the Arbitrator in the award dated 25.10.1997. It was not within the purview of the Arbitrator as to how to recover the amount which was found by the Arbitrator as recoverable from the appellant. Therefore, the observations made by the Arbitrator to the extent that he directed the claimant to recover the amount outstanding against principal debtor/guarantors by the sale of the mortgage property was beyond the scope of his jurisdiction and can be taken to be a surplusage which means nothing. Moreover, the property of the judgment debtors has been sold not in pursuance of the observations made by the Arbitrator in the arbitration award but because the said property i.e. house No.279-P, NAC, Shivalik Enclave, Mani Majra, Chandigarh was mortgaged by the appellant in favour of respondent No.1 as a guarantee for the repayment of those very loans. Therefore, the observations made by the Arbitrator to the effect that the mortgaged property be put

to sale for the recovery of the amount outstanding against the judgment debtors was of no consequence and were just immaterial. The Arbitrator was merely to decide the amount outstanding against the judgment debtors and his job was over after he determined that amount. Anything said thereafter by the Arbitrator is inconsequential and beyond his jurisdiction. These observations made by the Arbitrator cannot be stretched beyond proportion.

Moreover, by these observations, the Arbitrator had not created rights in immovable property for the first time. These rights of the decree holder already existed as the judgment debtors had mortgaged this property in favour of the decree holder at the time of taking loan. It has also been specifically mentioned by the Arbitrator in the award dated 25.10.1997 that the property i.e. House No.279-P, NAC, Shivalik Enclave, UT, Chandigarh was under mortgage with the award holders. Therefore, the Arbitrator has not created any new right in the immovable property under reference for the first time against the judgment debtors.

So far as judgment of the Hon'ble Supreme Court in Lachhman Dass's case (supra) relied upon by the learned counsel for the appellant is concerned, the facts were entirely different. In that case, the dispute referred to the Arbitrator was regarding the determination of rights in the immovable property. The Hon'ble Supreme Court was further pleased to observe that only that award needed registration

which creates rights in immovable property of the value of more than Rs.100/- for the first time. It is clear from the following observations made by the Hon'ble Supreme Court in para 15 of the judgment:-

“On a proper construction of the award, it does appear to us that the award did create, declare or assign a right, title and interest in the immovable property. The award declares that 1/2 share of the ownership of Shri Lachhman Dass shall “be now owned by Shri Ram Lal, the respondent in addition to his 1/2 share owned in these lands.” Therefore, the said award declares the right of Ram Lal to the said share of the said property mentioned in that clause. It is not in dispute that the said property is immovable property and it is not merely a declaration of the pre-existing right but creation of new right of the parties. It is significant to bear in mind that the section enjoins registration wherever the award “purports or operates to create, declare, assign, limit or extinguish” whether in present or in future any right, title or interest of the value of Rs.100/- or upwards in immovable property.”

Therefore, this judgment is not applicable to the facts of the present case as the Arbitrator has not created any new right in the immovable property for the first time. The arbitration award dated 25.10.1997 did not require registration and, therefore, is enforceable in

law.

The submission of learned counsel for respondent No.1 was that this objection should have been taken by the appellant in proceedings under Section 34 of the Act of 1996. Since this objection was not taken there, therefore, the appellant is debarred from taking this plea at this stage. This submission was countered by the learned counsel for the appellant that such an objection can be taken only in proceedings under Section 36 of the Act of 1996 when the said award is put to execution. Reliance was placed on the judgment of the Hon'ble Supreme Court reported as **M. Anasuya and another Versus M. Manik Reddy and others, 2003(4) Recent Civil Reports 763.**

There is merit in the submission of the learned counsel for the appellant that he was entitled to take this objection in proceedings under Section 36 of the Act of 1996 even if this objection was not taken in proceedings under Section 34 of the Act of 1996. However, as has been held above, the arbitration award did not require registration and is enforceable in law.

The next submission made by the learned counsel for the appellant was that the appellant had filed the objection petition under Section 34 of the Act of 1996 in January, 1998. The said objection petition was dismissed by the Court of Additional District Judge, Chandigarh on 14.9.2001 (Annexure P-2). Under Section 36 of the Act of 1996, an execution application can be filed only after the decision of

the objection petition under Section 34 of the Act of 1996 which means that the execution application could not be filed prior to 14.9.2001. In the present case, admittedly, the execution application was filed by respondent No.1 on 14.2.2000 i.e. at a time when the objection petition filed by the appellant was pending consideration in the competent court of law. Therefore, the said execution application is void ab initio. Reliance was placed on the judgment of the Hon'ble Supreme Court reported as **National Aluminium Co. Ltd.. v. M/s Pressteel and Fabrications Pvt.Ltd and another**, AIR 2005 Supreme Court 1514 in which it was held by the Hon'ble Supreme Court as under:-

“Learned counsel then prayed that at least the amount representing that part of the award which is in their favour should be directed to be deposited in the competent civil Court by the respondent herein so that the applicant could enjoy the fruits of the said award during further proceedings. At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the Court below so that the applicant can withdraw it on such terms and conditions as the said Court may permit them to do as an interim measure. But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under S.34 within the time stipulated herein,

becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes permissible. **On facts of this case,** (emphasis supplied) there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Art.142, we restrain ourselves from passing any such order, as prayed for by the applicant.”

No doubt, the law is that an application for enforcement of the award can be filed after the decision of the objection petition filed under Section 34 of the Act of 1996, but in the present case, a plea was taken by the decree holder (respondent No.1) in the objection petition filed under Section 34 of the Act of 1996 that there was no dispute between the parties regarding the principal amount and that the dispute was only regarding the rate of interest which was chargeable by respondent No.1 on the principal amount. This application was contested by the judgment debtors including the appellant. This application was decided against the appellant by the Court dealing with the objection petition vide order dated 12.2.2000. But no appeal or revision was filed against that order by the present appellant to challenge the legality and validity of the order dated 12.2.2000 which

became final. By this order, permission was granted to respondent No.1 to file execution application relating to the amount which was undisputedly recoverable from the appellant in execution of award dated 25.10.1997. Therefore, the inaction on the part of the appellant to challenge that order dated 12.2.2000 debars him from taking this plea now at this stage.

Secondly, although the execution application was filed on 14.2.2000 but the concrete steps for the sale of mortgaged property were taken by the executing Court only after the objection petition was dismissed by the competent Court of law on 14.9.2001. Application under Order 21 Rule 66 read with Section 151 CPC was filed by respondent No.1 on 2.2.2002. It was served on the judgment debtors including the appellant on 4.5.2002. The property was put to sale on 5.8.2002 but the bidders were not available and actual auction had taken place on 27.5.2003. Therefore, these facts cannot be ignored while considering the submissions advanced by the learned counsel for the appellant.

So far as judgment of the Hon'ble Supreme Court in **N.Aluminium Co.Ltd's** case (supra) is concerned, the question before their Lordships was reproduced by their Lordships in para No.4 of the judgment. It reads as under:-

“On the facts of this case, 2 primary questions arise for our consideration. They are:(i) whether the proceedings in

which impugned award has come to be made, are governed by the 1940 Act or the 1996 Act and (ii) whether the appropriate Court for the purpose of challenging the said award seeking modification of the said award is this Court, being the Court which appointed the arbitrator or an appropriate Court as contemplated under Section 34 of the 1996 Act read with Section 2(e) of the said Act which contemplates said Court to the principal civil Court of original jurisdiction”.

It was only at the time of arguments before their Lordships that a prayer was made requiring the judgment debtors to deposit the awarded amount.

In view of the statutory provision of law laid down in Section 36 of the Act of 1996, their Lordships did not feel inclined to issue any such direction requiring the judgment debtors to deposit the amount in the facts of that case. But, in the present case, a specific order was passed by the Court on 12.2.2000 after hearing both the parties and the appellant had failed to take any appellate or revisional remedy against that order. Therefore, that matter had become final. Moreover, as discussed above, the property of the judgment debtors was put to sale only after petition under Section 34 of the Act of 1996 was decided by the competent Court of law. Therefore, this Court does not find any merit in the submission of the learned counsel for the

appellant.

The next submission made by the learned counsel for the appellant was that reserve price of house No.279-P, NAC, Shivalik Enclave, UT, Chandigarh was fixed at Rs.50 lacs while the decretal amount was stated to be much more than that. The decree holder himself is the auction purchaser and, therefore, the provisions of Order 21 Rule 72-A CPC have been violated which required that the reserve price cannot be less than the decretal amount.

So far as this legal submission is concerned, there is no quarrel with it. Sub rule (2) of Order 21 Rule 72-A CPC provides that if leave to bid is granted to such mortgagee, then the Court shall fix a reserve price not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot. In the present case, admittedly the property was sold in one lot. The perusal of the record reveals that the amount stated in the execution application as recoverable from the judgment debtors was less than Rs.50 lacs and the reserve price was fixed by the learned executing Court in accordance with law. As discussed in para No.2 of the judgment, the principal amount was less than Rs.42 lacs. The Arbitrator had awarded interest at the rate of 24% per annum vide award dated 25.10.1997 but it was claimed at the rate of 7.5%. Therefore, by calculating interest, the total amount recoverable by the decree holder was stated to be Rs.46,94,357/-. It was for that reason that after

bidding at the auction on 27.5.2003, the decree holder had deposited 1/4th of the balance sale consideration of Rs.3,65,643/-. The remaining amount constituting 3/4th of the balance sale consideration amounting to Rs.2,74,233/- was also deposited by the decree holder. Therefore, the decretal amount was only Rs.46,54,357/- while the reserve price was fixed at Rs.50 lacs. Therefore, the provisions of Order 21 Rule 72-A CPC have not been violated.

Another submission made out by the learned counsel for the appellant was that the value of house No.279-P, NAC, Shivalik Enclave, UT, Chandigarh was not less than Rs.80 lacs but no proper publicity for sale was given. There was some clerical error in the warrant of sale and in the auction notice which also brought down the price of the house. It was prayed that the sale be set aside.

This submission has been considered.

It was reported by the Court Auctioneer that no person was prepared to purchase this house. It was for this reason that the decree holder filed an application for permission to purchase the property which was granted by the Court. Since no person was prepared to purchase the property, therefore, it is only an imaginary argument raised by the learned counsel for the appellant that the value of the property was much more. Even before the executing Court, the decree holder had given the offer to the judgment debtors to take back the property on the condition that the judgment debtors make the payment

of decretal amount to the decree holder along with necessary expenses. This argument was raised by the learned counsel for respondent No.1 before this Court also.

The next submission made by the learned counsel for the appellant was if the total decretal amount was Rs.46,54,357/- then the decree holder had no right to make a claim of Rs.6,70,724/- on account of interest over and above the amount of Rs.46,54,724/-. It was submitted that the decree holder had no right to claim any amount after the property was sold in auction on 27.5.2003 and whatever amount was recoverable, the decree holder was required to disclose to the Court. Admittedly, no further amount was disclosed by the decree holder to the learned executing Court after the filing of execution application and before the property was put to sale.

This submission has been considered. It has merits. The total claim set up by respondent No.1 was for an amount of Rs.46,94,357/-. After the said amount was met out out of the sale proceeds of house No.279-P, NAC, Shivalik Enclave, UT, Chandigarh, the decree holder had no right to make any more claim. The payment of Rs.46,94,357/- meets out the decretal amount and satisfies the awards.

The decree holder, respondent No.1, had claimed an amount of Rs.46,94,357/- at the time of the filing of the execution application. After the said execution was filed in the Court, the decree holder would not be entitled to any interest for the delay caused by him

in executing the award/decreed or at the most it can be said that it was the procedural delay in putting to auction the mortgaged property, but, certainly the judgment debtors cannot be held liable to pay interest to respondent No.1 for this delay. It is, therefore, held that respondent No.1 was not entitled to any amount after the recovery of Rs.46,94,357/-. However, the learned executing Court has permitted the decree holder to withdraw an amount of Rs.70,018/- although the decree holder was not entitled to this amount.

For the reasons discussed above, there is no legal defect in the sale of house No.279-P, NAC, Shivalik Enclave, UT, Chandigarh. The same is up-held. The decree holder shall re-deposit the amount of Rs.70,018/- in the executing Court within one month from today which shall be payable to the owner of house No.279-P, NAC, Shivalik Enclave, UT, Chandigarh i.e .the appellant. If respondent No.1 fails to deposit the amount of Rs.70,018/- within the time stipulated above, then the appellant shall be entitled to recover this amount from respondent No.1 with interest at the rate of 18% per annum from the date of judgment. In the interest of justice, if the appellant deposits Rs.50,60,000/-minus Rs.70,018/- in the learned executing Court within two months from today, then this property would revert back to the owner by deeming that its sale in public auction has been set aside. The amount so deposited by the appellant shall be adjusted in the same manner as sale proceeds have been adjusted.

F.A. O. No.1786 of 2005.
18

These appeals are disposed of in the manner indicated
above.

September 1 ,2006
Jaggi

(S. N. Aggarwal)
Judge